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No. 90-754

In The

Supreme Court of the United States

October Term, 1990

CALVIN J. PERKINS,

Petitioner,

v.

THE FARM CREDIT BANK OF WICHITA, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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17

TABLE OF CONTENTS

Page

Table of Authorities with Citations ii

Summary of the Argument 1

The Argument

Obligations of Counsel Pursuant to Supreme Court Rule 15.1 2

There is no Conflict in the Decisions of Circuit Courts 5

There is no Important Question of Federal Law Which Should be Decided 7

Conclusion 9

TABLE OF AUTHORITIES WITH CITATIONS

Pages

CASES

Bowling v. Block, 785 F.2d 556 (6th Cir. 1986), *cert. denied*, sub nom. *Bower v. Lyng*, 479 U.S. 829, 107 S.Ct. 112 (1986) 7

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975) 7

Griffin v. Federal Land Bank of Wichita, 902 F.2d 22 (10th Cir. 1990) 5, 6

Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 867 (1990) 5, 6, 8

Hays v. L.C.I., Inc., 604 P.2d 861 (Okla. 1979) 4

Leckband v. Naylor, 715 F.Supp. 1451 (D.Minn. 1988), *appeal dismissed*, No. 88-5301 (8th Cir. June 8, 1989) 4

Neth v. Federal Land Bank of Jackson, 717 F.Supp. 1478 (S.D. Ala. 1988) 8

Payne v. Federal Land Bank of Columbia, No. 89-1028 (4th Cir. Oct. 16, 1990) 6

Perkins v. Farm Credit Bank of Wichita, No. 90-1095 (10th Cir. Aug. 17, 1990) 6

Redd v. Federal Land Bank of St. Louis, 851 F.2d 219 (8th Cir. 1988) 8

Smith v. Russellville Production Credit Association, 777 F.2d 1544 (11th Cir. 1985) 7

Walker v. Federal Land Bank of St. Louis, 726 F.Supp. 211 (C.D. Ill. 1989) 8

Zajac v. Federal Land Bank of St. Paul, 887 F.2d 844 (8th Cir. 1989) 4, 5, 8

TABLE OF AUTHORITIES – Continued

Pages

Zajac v. Federal Land Bank of St. Paul, No. 88-5353ND (8th Cir. Dec. 7, 1989) (available on Lexis 18809) 4

Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181 (8th Cir. 1990) 4, 5, 6

STATUTES AND REGULATIONS

Agricultural Credit Act of 1987, Pub. L. No. 100-233 ..... 2, 6, 8, 9

12 U.S.C. Section 2001, et seq. 7

12 U.S.C. Section 2202(a) 8

12 U.S.C. Section 2219(a) 2, 4, 8, 9

RULES

Supreme Court Rule 10.1(a) 1, 4, 5, 6

Supreme Court Rule 10.1(c) 2, 4, 7

Supreme Court Rule 15.1 ..... 2, 4

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CALVIN J. PERKINS,

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v.

THE FARM CREDIT BANK OF WICHITA, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENT FARM CREDIT BANK OF WICHITA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF THE ARGUMENT

There is no conflict amongst circuits of the United States Court of Appeals which have rendered decisions on the issue presented that would fall within the scope of Supreme Court Rule 10.1(a). The Eighth, Ninth and Tenth Circuits have ruled uniformly on the issue, and the Fourth Circuit did not address it.

The cases which have evaluated the issue of an implied private right of action in the Farm Credit Act of

1971 and its amendments, including the 1987 amendments, do not disclose an important question of federal law which has not been, but should be, settled by the Supreme Court as contemplated in Supreme Court Rule 10.1(c).

THE ARGUMENT

OBLIGATIONS OF COUNSEL PURSUANT TO SUPREME COURT RULE 15.1.

A. Respondent, Farm Credit Bank of Wichita[1], first addresses four perceived misstatements of fact contained in the petition.

> 1. Respondent believes the petitioner's intended conclusion on pages 2 and 3 of his petition is that the most significant purpose of the Agricultural Credit Act of 1987 is a farmers' rights act when it is not.
>
> The preamble to H.R. 3030, (the short title of which is "Agricultural Credit Act of 1987" Pub. L. No. 100-233), states as follows:
>
> > "An act to provide credit assistance to farmers to strengthen the Farm Credit System, to facilitate the establishment of secondary markets for agricultural loans and for other purposes."
>
> The issue before this Court is limited to Section 108 of Title I, now 12 U.S.C. § 2219(a). Viewed in proper perspective, the Act contains provisions for both borrowers' rights and

[1] The Farm Credit Bank of Wichita, a federally chartered corporation, has no parent or subsidiary company to be disclosed under Sup.Ct.R. 29.1.

duties, and for the protection of the Farm Credit System as well.

2. The second misstatement of fact is found on page 4 of the petition. Mr. Perkins states that he "lost the opportunity to repurchase his land at a market price as opposed to having to redeem it for the full amount of the debt."

The Sheriff's sale on the Perkins property was conducted pursuant to the State Court's order of sale, which is appended to this brief. (Appendix A). The sale was for 14 separate tracts of land, plus one for water rights, a total of 15 separate bids. At the sale, Farm Credit Bank bid for nine tracts plus the water rights and received certificates of purchase on each. Mr. Perkins could have redeemed any of the tracts without paying the full amount of the debt, contrary to what was stated in the petition. He would have only to pay the amount bid for any tract redeemed; an amount substantially less than the full amount of the debt.

3. The third perceived misstatement of fact arises on page 4 of the petition. By stating that "FCB conveyed its interest" in Parcels IV and IX, petitioner implies that respondent owned the property. This is incorrect. After the Sheriff's sale, but prior to obtaining any deed from the Sheriff, the Farm Credit Bank sold the certificates of purchase for Parcels IV, IX and the water rights to the other named respondents. Under Colorado law, the Farm Credit Bank never acquired title to this property.

4. The fourth perceived misstatement of fact is contained in the second paragraph on page 4 of the petition. The statements as to "key parcel" and "financing" were alleged in the original complaint and denied by Farm Credit Bank so they have never been proven as facts,

because the case was decided on summary judgment.

B. The petition cites two cases as authority in support for various propositions raised. We perceive these to be misstatements of the law and set them out as required by Supreme Court Rule 15.1.

1. The first of these cases is *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989). This case is cited five times in the petition on pages 6, 7, 8, 9 and 10.

Zajac was vacated by the United States Court of Appeals for the Eighth Circuit on December 7, 1989, *Zajac v. Federal Land Bank of St. Paul*, No. 88-5353ND (8th Cir. Dec. 7, 1989) (available on Lexis 18809). (Text of the vacation order is Appendix B.) A vacated case is a case which has been eliminated, set aside, void or a nullity. Consequently, for purposes of citation, it cannot be the law. (See: *Hays v. L.C.I., Inc.*, 604 P.2d 861 (Okla. 1979)). Therefore, we believe the citation of the vacated *Zajac* case to be a misstatement of law.

2. The second case is *Leckband v. Naylor*, 715 F.Supp. 1451 (D.Minn. 1988), *appeal dismissed*, No. 88-5301 (8th Cir. June 8, 1989). *Leckband* was a case involving 12 U.S.C. § 2219(a). On May 17, 1988, that Court found that a private right of action existed under Section 2219(a) of the Act. However, this case is effectively overruled by the en banc decision *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990). At best, *Leckband* might be considered as argument for the issue in this case, but not as a reason for granting certiorari under the provisions of Supreme Court Rules 10.1(a) and 10.1(c).

THERE IS NO CONFLICT IN THE DECISIONS OF CIRCUIT COURTS.

Supreme Court Rule 10.1(a) identifies a conflict of decisions between various circuits of United States Court of Appeals on the same issue as a factor to be considered in granting a petition for certiorari. There is no conflict among the circuits as to an implied private right of action in the 1987 amendments to the Farm Credit Act.

The first to decide the matter was the Ninth Circuit. On June 27, 1989, *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 867 (1990), held that no implied private right of action existed in the 1987 Act.

Harper petitioned for certiorari based upon a conflict between the Ninth Circuit and the Eighth Circuit because of the decision in *Zajac* before it was vacated. When *Zajac* was vacated and the brief in opposition was submitted to this Court on December 22, 1989, certiorari was denied on January 22, 1990.

While the *Zajac* on rehearing decision was pending, the United States Court of Appeals for the Tenth Circuit was considering *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990), then on appeal from the District Court of Kansas. On May 2, 1990, the Tenth Circuit Court followed *Harper* and found no implied private right of action.

The next significant case was the en banc decision of the Eighth Circuit in *Zajac*, 909 F.2d 1181 (8th Cir. 1990), decided on July 31, 1990, which followed *Harper* (reversing its vacated panel decision) and held no implied private right of action under the 1987 Act.

On August 17, 1990, the Tenth Circuit, in the case at bar, followed *Harper, Zajac* and its own case, *Griffin*, and in its unpublished opinion held Mr. Perkins had no private right of action. *Perkins v. Farm Credit Bank of Wichita*, No. 90-1095 (10th Cir. Aug. 17, 1990).

Petitioner argues that *Payne v. Federal Land Bank of Columbia*, No. 89-1028 (4th Cir. Oct. 16, 1990), created a split in the circuits with respect to the issue of the creation of an implied private right of action. (See petition pages 5 and 6.) Such is not the case. The matter of a private right of action was discussed in the brief of *Payne* before the Fourth Circuit Court of Appeals. However, the matter did not become an issue because the Federal Land Bank of Columbia, in its reply brief, specifically conceded the matter with the following language:

> "To begin with, the Land Bank will concede for purposes of this appeal that the statute in question creates rights which are enforceable by previous owners such as Mr. Payne."

Therefore, the issue of a private right of action, being implied by the Agricultural Credit Act of 1987, was not before the Fourth Circuit Court, and we can only speculate how that Court would have ruled had that issue been before it.

Under the circumstances, we do not have a conflict amongst the circuits of the United States Court of Appeals. Even the petitioner is less than emphatic about a conflict between the circuits, as the petition, on page 5, states there "appears to be a split". This falls short of the requirement of Supreme Court Rule 10.1(a).

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED.

The petitioner asserts he has submitted before this Court "an important question of federal law which has not been, but should be, settled by this Court." Other than to paraphrase Supreme Court Rule 10.1(c), no authority is cited for this proposition.

Respondent, Farm Credit Bank, does not believe the issue submitted by the petitioner represents an important question of federal law meeting the test of Supreme Court Rule 10.1(c), nor do any special and important reasons exist for the granting of a petition for certiorari.

A brief historical look at the Farm Credit Act should help demonstrate the validity of respondent's position. In looking at the annotations of the Farm Credit Act of 1971, 12 U.S.C. § 2001, et seq., it may be noted there are very few cases of any nature, which interpreted the Act up until 1984.

As the agricultural economy of the country began to deteriorate in the mid-eighties, litigation with respect to the Farm Credit Act increased. The issue of whether or not an implied private right of action existed under the 1971 Act was addressed. The leading cases were *Bowling v. Block*, 785 F.2d 556 (6th Cir. 1986), *cert. denied*, sub nom. *Bower v. Lyng*, 479 U.S. 829, 107 S.Ct. 112 (1986) and *Smith v. Russellville Production Credit Association*, 777 F.2d 1544 (11th Cir. 1985). *Bowling* applied the four elements necessary for finding an implied private right of action set forth by *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975) and found that no implied private right of action existed under the 1971 Act.

The private right of action issue was at rest until the 1985 amendments to the Farm Credit Act became law. The Courts were once again asked to determine whether the 1985 amendments created an implied private right of action.

A number of Federal District Courts and State Courts considered the implied private right of action issue in the 1985 amendments. The last word appears to be found in *Redd v. Federal Land Bank of St. Louis*, 851 F.2d 219 (8th Cir. 1988), holding that the 1985 amendments did not create an implied private right of action. We find no cases on the 1985 amendments where a petition for certiorari was filed.

The next amendment to the Farm Credit Act was the enactment of the Agricultural Credit Act of 1987, Pub. L. No. 100-233. This brief in opposition has already discussed the holdings of four of the circuits of the United States Court of Appeals on the issue of an implied private right of action in the 1987 amendments.

Two District Courts in other circuits have addressed the implied private right of action issue as to the 1987 Act. In Alabama, *Neth v. Federal Land Bank of Jackson*, 717 F.Supp. 1478 (S.D. Ala. 1988), no private right of action under 12 U.S.C. § 2219(a) was found. In Illinois, *Walker v. Federal Land Bank of St. Louis*, 726 F.Supp. 211 (C.D. Ill. 1989), held no implied private right of action existed. While Walker is a restructure case, (12 U.S.C. § 2202(a)), its analysis is significant because it was decided after *Harper* but prior to the vacation of *Zajac*.

Lower courts have demonstrated sufficient uniformity in method and decision to render certiorari on the issue presented in this case unnecessary.

CONCLUSION

The petitioner's claim that a conflict exists amongst the circuits of the United States Court of Appeals is illusory. The cases clearly show no such conflict exists.

The decisions of the various circuits of the United States Court of Appeals, as well as those in the United States District Courts, show a uniform evaluation of the issue of an implied private right of action with respect to § 2219(a) of the Agricultural Credit Act of 1987. Their ability to consistently resolve this issue demonstrates that it is not such an important question of federal law that certiorari should be granted.

Therefore, respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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The Farm Credit Bank of Wichita

Date: December 10, 1990

APPENDIX

DISTRICT COURT, COUNTY OF ARCHULETA,
STATE OF COLORADO
CASE NO. 87CV16

ORDER FOR SALE

FEDERAL LAND BANK OF WICHITA and NINTH DISTRICT PRODUCTION CREDIT ASSOCIATION OF WICHITA, f/k/a SOUTHWEST PRODUCTION CREDIT ASSOCIATION,

Plaintiffs,

-vs-

CALVIN PERKINS a/k/a CALVIN J. PERKINS, EATON INTERNATIONAL CORPORATION n/k/a FAIRFIELD PAGOSA, INC., COLORADO LAND TITLE COMPANY as nominee, DWIGHT A. SOSSAMAN, GRACE A. SOSSAMAN, JOHN C. PERKINS, WARDLOW LANE, and TINNIE LATTIN, as Public Trustee of Archuleta County, Colorado,

Defendants.

The matter of the method of sale on execution to a judgment and decree of foreclosure entered effective May 19, 1987, came before this Court May 27, 1987. All plaintiffs and defendants were represented by counsel, save and except the Public Trustee of Archuleta County.

After consideration of the factual data and arguments submitted, the Court finds that the equitable doctrine of marshalling should apply and the property should be sold in parcels in order to assist in maximizing the proceeds of the sale and to provide an opportunity for the defendant Calvin Perkins and junior lienholders to redeem parcels of land to protect their investment.

IT IS THEREFORE ORDERED that properties be sold in parcels generally as set forth on Exhibit "C" attached to the judgment and decree. Other property interests shall be sold as described in the mortgage or deed of trust. Water rights shall be sold with the lands they irrigate so far as is practicable, except that one second foot in the Pagosa Lumber Company Ditch No. 1 under priority 132 (75A), which apparently irrigates Parcel No. IV, shall be sold separately of Parcel No. IV. The last parcels to sell shall be sold in the following order:

Parcel VII, VIII, X, XII, XIII and XIV.

The sale shall be conducted by the Sheriff of Archuleta County pursuant to writ of execution issued out of this Court advertising and sale conducted by law.

Signed this 27th day of May, 1987.

BY THE COURT

/s/ Al H. Haas
JUDGE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-5353ND	*	
Raymond P. Zajac and Helen Ann Zajac,	*	Appeal from the United States District Court for the District of North Dakota
Appellants.	*	
vs.	*	
Federal Land Bank of St. Paul,	*	
Appellee.	*	

The panel opinion filed and the judgment entered on October 5, 1989 are vacated, and appellee's suggestion for rehearing en banc is granted. The case is set for oral argument before the Court en banc at 8:30 a.m. on Friday, January 19, 1990, in the U.S. Court and Custom House in St. Louis, Missouri. Argument is limited to fifteen (15) minutes per side.

Counsel may simultaneously file, within thirty (30) days of the date of this order, supplemental briefs which are not duplicative of the briefs originally filed. The supplemental brief should not exceed fifteen (15) pages in length.

December 7, 1989.

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain.
Clerk, U.S. Court of Appeals, Eighth Circuit.